Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF ALABAMA and
JAMES E. FOLSOM, Governor,
State of Alabama, Petitioners,

v.

POARCH CREEK INDIANS and POARCH BAND OF
CREEK INDIANS, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do Article III, § 2 and the Eleventh Amendment preclude substantive judicial interpretation of the Indian Gaming Regulatory Act after the case has been dismissed for lack of subject matter jurisdiction?

2. Does the exercise by a state of its Eleventh Amendment immunity, standing alone, constitute a failure to negotiate in good faith as required by the Indian Gaming Regulatory Act?

3. Was the Eleventh Circuit correct that an Indian tribe may bypass statutory requirements, including a judicial finding of lack of good faith by a state, and go directly to the Secretary of the Interior for a gaming compact, or was the Eighth Circuit correct in adhering to the language of the Indian Gaming Regulatory Act?

4. Does the creative bypass designed by the Eleventh Circuit violate the Tenth Amendment?

PARTIES

The caption contains the names of all parties to the proceeding in the court below in Poarch Band.

Parties in the case consolidated on appeal with this case in the Eleventh Circuit were:

Seminole Tribe of Florida,
Appellant-Plaintiff

State of Florida,
Lawton Chiles, Governor of Florida,
Appellees-Defendants

Amici Curiae appearing in the Eleventh Circuit were:

The National Indian Gaming Association

The Tunica-Biloxi Tribe

The States of:

California
Connecticut
Kansas
Mississippi
Montana
Nebraska
Nevada
Oklahoma
South Dakota
Washington
Wyoming

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OPINIONS BELOW

1. The opinion and judgment of the Eleventh Circuit is reported as Seminole Tribe of Florida v. State of Florida, et al. and Poarch Creek Indians v. State of Alabama, et al., 11 F.3rd 1016 (11th Cir. 1994), consolidated on appeal, and is submitted as Appendix A.

2. The opinions of the United States District Court for the Southern District of Alabama, dismissing this cause for lack of subject matter jurisdiction, are reported as follows: Poarch Creek Indians, et al. v. State of Alabama, et al., 776 F.Supp. 550 (S.D.Ala. 1991) and 784 F.Supp. 1549 (S.D.Ala. 1992), and are submitted as Appendices B and D. A third order is unpublished and is submitted as Appendix C.[1]

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[1]The appendices to this petition are separately bound pursuant to Rule 14.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed here was entered on January 18, 1994. Appendix A. On April 6, 1994, the Eleventh Circuit entered an order denying a timely application for rehearing. Appendix E. On April 28, 1994, the mandate was stayed. Appendix F.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, Tenth Amendment states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Constitution of the United States, Eleventh Amendment states:

> The judicial power of the United States shall not be construed to extend to any suit

> in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Constitution of the United States, Article III, § 2 is set forth in Appendix H.

25 U.S.C. §§ 2703(8) and 2710(d) of the Indian Gaming Regulatory Act, the most relevant here, are set forth in Appendix G.

STATEMENT UNDER RULE 29.4(b)

Since the constitutionality of IGRA, an Act of Congress affecting the public interest, may be drawn into question, 28 U.S.C. § 2403(a) may be applicable and this document will be served on the Solicitor General.

The Court of Appeals certified to the Attorney General that the constitutionality of an Act of Congress might be drawn into question and the Attorney General declined to appear below.

STATEMENT OF THE CASE

NATURE OF THE CONTROVERSY

The Indian Gaming Regulatory Act (IGRA) establishes a comprehensive statutory scheme for the regulation of gambling on Indian lands. 25 U.S.C. § 2701, et seq., and 18 U.S.C. 1166-68. It is the result of years of legislative debate and prior judicial decisions. S.Rep. No. 100-446, 100th Congress, 1st Sess. 1-5, 1988 U.S. Code Cong. & Admin. News 3071-3076.

Under IGRA Congress created three categories of gaming. The issues before this Court relate to Class III gaming, which includes all forms of gambling other than traditional Indian games and bingo. 25 U.S.C. § 2703(8).[2] Class III

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[2]All cited provisions of IGRA are contained in Appendix G.

gaming is lawful only in a state which permits such gambling for any purpose by any person, entity or organization. 25 U.S.C. § 2710(d)(1)(B).

A tribe desiring to conduct Class III gambling must request the State in which the Indian lands are located to negotiate a tribal-state compact governing Class III gambling. The State, according to IGRA, is directed to negotiate with the Indian tribe in good faith. 25 U.S.C. § 2710(d)(3)A.

If a State fails to negotiate or negotiate in good faith, IGRA provides that a tribe may initiate suit in federal district court. § 2710(d)(7)(A)(i).

If the court finds that the State has not acted in good faith, the court directs the State and the Tribe to conclude a compact. § 2710(d)(7)(B)(iii). If the compact is not completed within sixty days, the court appoints a mediator.

§ 2701(d)(7)(B)(iv). The compact proposal selected by the mediator is then sent to the Secretary of the Interior for implementation. § 2710(d)(7)(B)(vii).

Contrary to the Eleventh Circuit opinion, there is no provision in the statute for an Indian Tribe to apply directly to the Secretary of the Interior for a compact. Nor are there any provisions authorizing the Secretary to create a compact or to permit gambling on Indian lands without a state-tribal compact.

THE DISTRICT COURT PROCEEDINGS

Alabama offered to compact with the Poarch Band for pari-mutuel wagering on horse, dog and simul-cast races, the only forms of Class III gaming permitted under Alabama law. (R1-1-11; R1-1-14 through -16). The Tribe alleged that Alabama permits all types of gambling, other than a lottery, and that the Governor had

negotiated in bad faith by not agreeing to conclude a compact for casino gambling which is not allowed anywhere in Alabama. (R1-1-4 through -13) Negotiations having ended, the Poarch Band of Creek Indians filed suit against Alabama and its Governor on September 11, 1991, seeking a determination of the scope of gaming and a compact. Appendix B6-B9; (R1-1). All allegations of bad faith were denied by Alabama and the Governor. (R1-4 and R1-5) Jurisdiction was asserted primarily under § 2710(d)(7)(A)(i) of IGRA. Appendix A15.

The State answered and filed a motion to dismiss under the Eleventh Amendment. Appendix B8. On October 30, 1991, Alabama was dismissed. Appendix B70. After the Poarch Band's complaint was amended, Alabama was again dismissed. Appendix C7.

The Governor filed a motion to dismiss on Eleventh Amendment grounds and

the motion was granted on February 20, 1992. Appendix D1 and D17. All defendants having been dismissed, the Poarch Band's suit was terminated without reaching the merits of the matter, including whether negotiations were conducted in good faith. Appendices B, C and D.

THE CIRCUIT COURT PROCEEDINGS

On appeal, the Eleventh Circuit, having jurisdiction under 25 U.S.C. § 1291, consolidated Seminole Tribe of Florida v. State of Florida and Lawton Chiles, Governor (No. 92-4652) and Poarch Creek Indians, et al. v. State of Alabama and James E. Folsom, Governor (No. 92-6244), reported at 11 F.3rd 1016 (11th Cir. 1994). Appendix A, infra. In each of these cases the states asserted immunity from suit by Indian Tribes by virtue of the Eleventh Amendment. The Eleventh Circuit affirmed the dismissal of

the suit against Alabama in Poarch Band and reversed the district court in Seminole Tribe holding that both cases were to be dismissed for lack of subject matter jurisdiction. Appendix A66 and A69.

Section 2710(d)(7)(B)(iii) of IGRA mandates a threshold judicial finding that a state has failed to negotiate in good faith before relief can be granted. However, after ordering dismissal of the action, the Eleventh Circuit while "analyzing its holding" in Section V. of its decision, designed a bypass for the Tribes, permitting them to go directly to the Secretary of the Interior for gaming regulations. Seminole Tribe, 11 F.3rd at 1019, 1029. Appendix A66-A68.

REASONS FOR GRANTING THE WRIT

I.

INTERPRETATION OF THE INDIAN GAMING REGULATORY ACT PRESENTS QUESTIONS OF GREAT IMPORTANCE.

Rarely does a state who prevailed below seek review.[3] However, the importance of interpretation of the Indian Gaming Regulatory Act (IGRA), not only for the states, but also for Indian Tribes and the Secretary of the Interior, calls for review by this Honorable Court.

The Eleventh Circuit, interpreting IGRA, after having dismissed the action under the Eleventh Amendment, assumed jurisdiction and devised a remedy for the Poarch Band not found in IGRA. In order to do this, the Eleventh Circuit had to determine that raising a valid constitutional bar to a suit by a Tribe constitutes a lack of good faith by a

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[3]While it may appear on the face of the judgment that the State of Alabama and the Governor are prevailing parties, the result of the written opinion is that the Tribes may have won by losing.

state. Seminole Tribe, 11 F.3rd at 1029; Appendix A66-A68.

The Secretary, not a party below, has been empowered to prescribe gaming regulations for Indian gaming operations in Alabama even though there is no statutory basis for doing so.[4] The Eleventh Circuit did not limit such gaming to that authorized by state law, as IGRA does. Even with a finding of bad faith this procedure is improper.

While Alabama recognizes that economic development is very important to the Poarch Band of Creek Indians and other Tribes, Alabama and other States also have important interests in Indian gaming,

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[4]Although judicial interpretation by the Eleventh Circuit is arguably dicta, the Attorney General has been informed by the Department of the Interior that it has taken preliminary steps toward prescribing gaming regulations pursuant to the Eleventh Circuit opinion.

including but not limited to, a strong public policy in Alabama against Class III casino gambling as evidenced by constitutional prohibitions and statutes making it a crime. The State of Alabama, its citizens, the Attorney General, and the Governor have a legitimate interest in these matters of public policy, as well as a duty to defend these interests by all lawful means, including asserting the defense of sovereign immunity.

As matters stand today, the circuit and district courts and Tribes and states currently in the negotiating process are in a quandary. In the circuit and district courts conflicting decisions are proliferating rapidly and the need for guidance from this Court is acute. This case presents a timely and unique opportunity for this Court to provide guidance, where none has been given.

Because the questions presented are important and for the reasons set out hereafter, this Court should grant the petition, vacate Section V. of the Eleventh Circuit decision and permit the Congress to address the issue.

II.

SECTION V. OF THE ELEVENTH CIRCUIT DECISION NOT ONLY CONTRAVENES THE CONSTITUTION OF THE UNITED STATES, ARTICLE III, § 2 AND THE ELEVENTH AMENDMENT, BUT IS IN CONFLICT WITH DECISIONS OF THIS HONORABLE COURT.

Despite holding that the court below lacked jurisdiction over the merits, the Eleventh Circuit assumed jurisdiction, and in Section V. of the decision interpreted the Indian Gaming Regulatory Act (IGRA). Seminole Tribe, 11 F.3rd at 1029. Appendix A66-A68. Such judicial interpretation on the merits is inappropriate and inconsistent with the district court's obligation to dismiss without reaching the merits.

Where a court, trial or appellate, is required to dismiss for lack of subject matter jurisdiction under the Eleventh Amendment, reaching the merits of a claim, even in what is arguably dicta, is itself a violation of the Eleventh Amendment. Apache Tribe of the Mescalero Reservation v. New Mexico, CIV 92-076-JC, Slip Op. at p. 2, (D.C.N.M. Dec. 22, 1992).

Judicial interpretation was also inappropriate here because once the matter was dismissed, there ceased to be a case or controversy. Constitution of the United States, Article III, § 2. In Section V. of its decision the Eleventh Circuit interpreted IGRA in violation of Article III and the Eleventh Amendment and in conflict with decisions of this Court.

In Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. _____, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993), this Court found that the denial

of a claim by a state entity to Eleventh Amendment immunity could be appealed under the collateral order doctrine. In making this finding, this Court wrote:

> Moreover, a motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection, cf. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 502-03 (1989) (Scalia, J., concurring), **whose resolution generally will have no bearing on the merits of the underlying action.**

Puerto Rico Aqueduct, 506 U.S. at _____, 121 L.Ed.2d at 613 (emphasis added).

In United States v. Sisson, 399 U.S. 267 (1970), this Court dismissing for lack of jurisdiction under 18 U.S.C. § 3731 held:

> Consequently, this appeal must be dismissed for lack of jurisdiction **without our considering the merits of this case**. . . .

Sisson, 399 U.S. at 270 (emphasis added). Additionally, this Court said:

> We have today granted certiorari in Gillette v. United States . . . and Negre v. Larsen . . . in order to consider the "selective" conscientious objector issue that underlies the case now before us **but which we cannot reach because of our conclusion that we have no jurisdiction to entertain this direct appeal.**

Id., 399 U.S. at 613, n. 1 (emphasis added).

In The News-Journal Corporation v. Foxman, 939 F.2d 1499 (11th Cir. 1991) the Eleventh Circuit wrote the following:

> In denying the News-Journal's motion for reconsideration based on Younger, the district court also commented upon the substance, particularly the scope, of the restrictive order. In essence, the district court analyzed the restrictive order under the First Amendment, although it abstained under Younger. **Any substantive commentary and analysis is inconsistent with abstention for lack of jurisdiction based on Younger.**

Foxman, 939 F.2d at 1511 (emphasis added).

In contrast to and in direct conflict with these decisions, the Eleventh Circuit

in Section V. of the decision judicially interpreted IGRA providing substantive commentary and analysis directly affecting the rights and duties of the parties.

Both Younger abstention and Eleventh Amendment immunity are jurisdictional. Both depend on federalism as their source. If a federal court lacks jurisdiction to entertain a suit, it must be dismissed and the matter concluded.

III.

THE ELEVENTH CIRCUIT DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS HONORABLE COURT.

The Indian Gaming Regulatory Act, in Section 2710(d)(7)(B)(iii), requires a threshold judicial finding that a state has failed to negotiate in good faith before any succeeding provisions become operative. The district court made no finding that Alabama had failed to negotiate in good faith, as the matter was resolved on motions to dismiss without

reaching the merits. Appendices B, C and D, infra. Yet, in order to reach the merits, the Eleventh Circuit had to assume jurisdiction and either turn a disputed factual allegation into an adjudicated fact or find that raising the Eleventh Amendment as a defense constitutes a lack of good faith or both.

Despite the fact that the Eleventh Circuit specifically declined to address a critical Tenth Amendment argument, crucial to a resolution of the issue, see Appendix A2-A3, n. 2, the Eleventh Circuit stated:

> Nevertheless, we are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit.

Seminole Tribe, 11 F.3rd at 1029 (emphasis added). Appendix A67-A68.

Alabama cannot consent to suit. Constitution of Alabama 1901, § 14; Alabama v. Pugh, 438 U.S. 781, 782 (1978),

Silver v. Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986); and Cabazon Band of Mission Indians v. National Indian Gaming Commission, 827 F.Supp 26, 34 (D.DC. 1993) (_____ F.3rd _____, 1994 WL 19995 (DC Cir. 1994), cert. denied).

Moreover, failing to accept all terms put forth by a Tribe is not, in and of itself, a failure to negotiate in good faith. The Governor of Alabama offered to negotiate a compact for horse, dog and simul-cast races, the only Class III gaming permitted in Alabama. (R1-1-11; R1-1-14 through 16). The Poarch Band demanded casino gambling. Appendix B6-B9. (R1-1-5 through -13) It is one thing to assume that an allegation of bad faith is true for the purpose of testing an affirmative defense. It is another matter entirely to treat an allegation as a finding of fact or assume that it has been adjudicated.

Once the Eleventh Circuit found that it was without subject matter jurisdiction, the matter should have been concluded. Nevertheless, the Eleventh Circuit assumed jurisdiction. Since it tried to turn a disputed factual allegation not decided below into an adjudicated fact, but cannot, the remaining result of its "dicta" is that raising a valid Eleventh Amendment defense to a suit by a Tribe, standing alone, constitutes a lack of good faith and empowers the Eleventh Circuit to design a bypass for the Tribes.[5]

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[5] In subsequent proceedings in Seminole Tribe v. State of Florida, 1993 WL 475999, page 13 (S.D.Fla.) (Sept. 22, 1993), currently stayed on appeal, (Eleventh Circuit No. 93-5256), the district court found that the State of Florida had, in fact, negotiated in good faith.

The Eleventh Circuit reached beyond the issue before it to make a finding which the Court below was without jurisdiction to entertain. Such judicial declarations violate Article III and the Eleventh Amendment.

The unsupported conclusion that a state who raises an Eleventh Amendment defense to suit by a Tribe has shown a lack of good faith not only raises an important question of initial impression, but is also a departure from the usual course of judicial proceedings calling for the supervisory powers of this Court.

IV.

THE DECISION OF THE ELEVENTH CIRCUIT IS ERRONEOUS.

The Eleventh Circuit, after determining that the court below correctly dismissed because it lacked jurisdiction, assumed jurisdiction and in Section V. of its decision also ignored other provisions of IGRA. The Eleventh Circuit remedy

permitting the Tribe to go directly to the Secretary of the Interior for a gaming compact is not found in IGRA.

While such a statutory scheme might be enacted by Congress in the future, it has not yet been done, nor was the issue addressed by the district court. Finding that the Tribe's remedy of suing an unconsenting state in federal court is unavailable does not open the door for the Eleventh Circuit to create a remedy not existing in the statute itself.

In The Apache Tribe of the Mescalero Reservation v. New Mexico, CIV 92-076-JC, Slip Op., (D.C.N.M. Dec. 22, 1992), the court stated:

> As in my order denying the Pueblo of Sandia's motion to amend or alter the dismissal Order in CIV 92-613JC, I further determine that it would be improper for this Court to address the severability issue raised by the Apache Tribe of the Mescalero Reservation. I have already found that the Eleventh Amendment precludes this action in federal court

> absent waiver by the State of its immunity in a federal forum.

Apache Tribe, CIV 92-076-JC, Slip Op. at 2 (emphasis added).

IGRA contains a process for negotiating and concluding a compact between a Tribe and a State. IGRA provides for suit, and after a judicial finding of either failure to negotiate or to negotiate in good faith, court-enforced negotiation, appointment of a mediator, where necessary, and implementation by the Secretary of the Interior of the compact chosen by the mediator. Succeeding provisions are intertwined with preceding provisions. § 2710(d)(7). Appendix G1-G14.

Congress set forth no procedure for a Tribe to go directly to the Secretary for a compact. In fact, under IGRA, only the mediator's compact is sent directly to the Secretary and that is for **implementation** of the chosen compact, not for creation of

a compact. § 2710(d)(7)(B)(vii)(I). Most importantly, the Secretary's only authority to prescribe procedures is not independent of, but tied to, the process set forth in Sections 2710(d)(7A)(ii) through 2710(d)(B)(vi) of IGRA. Appendix G, infra.

When a court lacks subject matter jurisdiction to act directly, that court cannot, as did the Eleventh Circuit, confer authority on an administrative agency such as the Department of the Interior to do indirectly what Congress has not empowered that agency to do directly. See, e.g., Montana-Dakota Utilities Company v. Northwestern Public Service Commission, 341 U.S. 246 (1951). This Court stated:

> [W]e know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose.

Montana-Dakota, 341 U.S. at 254.

Congress intended IGRA to be a means by which the varied public policies of tribal, state and Federal governments could be accommodated and reconciled. S.Rep.No. 100-446, 100th Congress, 1st Sess. 1-5, 1988 U.S. Code Cong. & Admin. News 3076. In Landgraf v. USI Film Products, ___ U.S. ___, ___, n. 36, 62 U.S.L.W. 4255, 4267, n. 36 (April 26, 1994), this Court noted that "[w]e are not free to fashion remedies that Congress has specifically chosen not to extend. See Northwest Airlines, Inc., v. Transportation Workers, 451 U.S. 77, 97 (1981)."

In Sisson, 399 U.S. at 298, this Court noted that a court must respect the limits up to which Congress was prepared to enact a particular policy, particularly when the statute was enacted as a compromise. Under IGRA Indian gaming is

lawful on Indian lands only if: (1) authorized by tribal ordinance; (2) located in a state which permits such gambling for any purpose by any person, entity or organization; and (3) conducted in conformance with a state-tribal compact. A process which totally eliminates state involvement was not intended by Congress. § 2710(d)(1).

V.

THE CONFLICT IN THE CIRCUITS SHOULD BE RESOLVED BY THIS COURT.

The Eighth Circuit, in Cheyenne River Sioux Tribe v. South Dakota, 3 F.3rd 273 (8th Cir. 1993) faced the same issues as the Eleventh Circuit, but reached a different conclusion. Following the statutory provisions of IGRA, the Eighth Circuit held that a state is required to negotiate with a Tribe only over those games authorized by state law. Cheyenne River, 3 F.3rd at 279.

Although Alabama offered to negotiate a compact for horse, dog and simul-cast races, the Poarch Band filed suit seeking full casino gambling. (R1-1-5 through -13) If Alabama were in the Eighth Circuit, Alabama would now be negotiating over those forms of gaming, as those are the only Class III games permitted under Alabama law.

Under the Eleventh Circuit decision, Alabama would be precluded from any participation in the formulation of regulations under which Indian Gaming is conducted in Alabama, if it has raised an Eleventh Amendment defense.

The results of these circuit court decisions interpreting IGRA constitute a conflict in the circuits which should be resolved by this Court.

VI.

BOTH THE INDIAN GAMING REGULATORY ACT AND THE CREATIVE BYPASS DESIGNED BY THE ELEVENTH CIRCUIT VIOLATE THE TENTH AMENDMENT.

After declining to address the Tenth Amendment argument presented in original briefs in this appeal, the Eleventh Circuit proposed a remedy that is foreclosed by the argument the Court failed to consider. The Eleventh Circuit could have addressed the Tenth Amendment argument on the basis that New York v. United States, _____ U.S. _____, 120 L.Ed.2d 120, 112 S.Ct. 2405 (1992), was an intervening decision addressing the issue raised and dispositive of the matter before the Court or that the decision in New York provided an alternate ground for sustaining the judgment of the district court.[6] Since the Eleventh Circuit

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[6]Tenth Amendment challenges to IGRA are currently pending in the Ninth and Tenth Circuits.

addressed a question not considered by the district court -- the remedy -- it should have been considered in its entirety.

Not only does IGRA violate the Tenth Amendment, the Eleventh Circuit remedy violates the Tenth Amendment. Under this suggested remedy, states have two coercive choices -- be sued by the Tribe or assert your immunity and have the Secretary of the Interior prescribe the manner in which Indian gaming will be conducted in your state. This is precisely that which is forbidden in New York v. United States, yet what the Eleventh Circuit declined to address.

CONCLUSION

The petition for a writ of certiorari should be granted and Section V. of the Eleventh Circuit decision vacated.

Respectfully submitted,

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